No. 12,641

IN THE

United States Court of Appeals

For the Ninth Circuit

AUBREY L. CHARMAN, STANLEY CUMMINGS, JOHN A. HRUTKY, and JOHN F. SCHWELLA,

Appellants,

vs.

PAN AMERICAN AIRWAYS, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

This brief filed on behalf of the appellee company will present a short restatement of the facts as disclosed by the record, followed by comments on the points of law set forth in the appellants' brief.

I.

RESTATEMENT OF FACTS.

An understanding of the facts in this case will be facilitated by a short restatement of the general background and the terminology used by the parties, as shown by the record.

A. Background and terminology.

According to the testimony[1] the appellee company is a carrier by air which has been engaged in flights across the Pacific Ocean since the historic flight of the China Clipper in November of 1935. The testimony was that there are several specific jobs to be done on the flight deck of large transoceanic planes, namely,

(a) *Piloting* the plane, that is, physically flying it;

(b) *Navigating* the plane, that is, making the observations and calculations to determine where the plane is and plotting its course to its destination;

(c) *Radio communication,* either by radio telegraph (dot and dash) or by radio telephone (voice); and

(d) *Engineering* operations, that is, watching the functioning of the engines.

The witnesses, including the appellants,[2] all described how these four above functions or jobs were combined or divided in various ways among the flight crews, depending on the type of plane, the availability of skilled men, etc. Sometimes, according to the witnesses, the job of piloting the plane and of making the observations for navigation were combined in one person, making him, therefore, a "pilot-navigator". If the jobs were separated, then the plane would have a "non-pilot navigator" as well as a pilot (and co-

[1]Transcript of Record, pp. 240 to 245.
[2]Transcript of Record, pp. 81, 148, 153, 191, and 193.

pilot), a "non-pilot navigator" being a man who acts as navigator only and does not fly the plane also. The term "professional navigator" is also sometimes used, according to the evidence, instead of "non-pilot navigator".

The same is true, according to the witnesses, as far as radio operation in the plane is concerned. There may be one individual who does nothing but operate the plane's radio, whose actual title is "flight radio officer", but who is usually referred to as an "FRO". On other planes there is no crew member whose sole and exclusive function is to operate the radio, and this job is done by the pilot (or copilot).[3]

It was also testified that the various types of planes operated by the appellee company across the Pacific have used progressively smaller crews. The planes first used were described as having a crew consisting of a pilot, a copilot, a navigator, an engineer, an assistant engineer, a radio operator and a relief radio operator.[4] The doubledeck Boeing Stratocruiser, which now flies across the Pacific, uses only "a pilot, copilot, engineer, and pilot-navigator", the pilot-navigator being described as a man who can fly the plane as well as make the navigation calculations.[5] This plane has no separate radio operator according to the testimony, and radio communication is handled by any one of the pilots, who merely picks up a microphone and speaks to his home base at will.[6]

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[3]Transcript of Record, p. 244.
[4]Id. p. 242.
[5]Id. p. 243.
[6]Id. p. 244.

B. Employee crafts and groups.

Three employee crafts which the appellee company deals with were described by the witnesses[7] as corresponding to the jobs mentioned above, namely

(a) pilots,

(b) navigators (i.e., those men who navigate but do not fly the ships, the "non-pilot navigators"), and

(c) radio operators (the so-called FRO group).

It was the testimony that until 1944 there were no unions representing these crafts, but that shortly thereafter independent associations represented each of the crafts. The navigators' craft, according to the witnesses, was first represented by an organization known as the Pan American Airways Navigators Association, and the radio operators' craft was initially represented by a separate organization known as the Flight Radio Officers Association.[8] These two organizations both subsequently affiliated with the Transport Workers Union (CIO) which negotiated separate collective bargaining contracts with the appellee company for each of the two crafts.[9]

C. The jobs held by appellants.

The four appellants were originally employed by the appellee company as radio operators, that is their work on the plane was only to operate its radio, which was operated on the old dot-and-dash radio telegraph

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[7]Transcript of Record, pp. 240 to 245.
[8]Id. pp. 93 to 94, and 215 to 220.
[9]Defendant's Exhibits D and G.

method.[10] They were not then qualified to perform the more highly paid job of navigator.[11]

As the wartime shortage of trained men began to set in, approximately in December of 1940, the appellee company adopted the policy described by the appellants in their complaint.[12] Instead of having both the piloting and navigating done by the same man (i.e., a "pilot-navigator"), the appellee company decided to separate the jobs by leaving the pilot free to do nothing but piloting and adding another man who would do the navigating but no piloting (i.e., the job designated by the confusing title of "non-pilot navigator"). As the appellants also testified, men already in the employ of the appellee company, and in particular, radio operators in the employ of its communications department, were given the opportunity to train for and qualify for this new job of "non-pilot navigator."

As will be shown in detail later, each of the four appellants qualified for this promotion and left his job as radio operator to become a non-pilot navigator. Each continued to serve in this capacity during the period of the war. When the war was over, the appellee company, as will be shown later, commenced flying new planes which did not require either a special man to do the navigating or a special man to work the radio, the pilots themselves doing both these jobs in addition to flying the plane. Hence, the four ap-

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[10]Transcript of Record, pp. 244 and 245.
[11]Id. pp. 79 and 90.
[12]Id. p. 3.

pellants find themselves with no job either as navigator or as radio operator, and this action was brought on certain re-employment rights claimed by them, claiming damages of $160,000 each.

D. The alleged contracts.

The claim by the appellants to a right of re-employment arises out of two memoranda or circular letters sent by the appellee company to the appellants and to other employees similarly situated. The full text of the two letters appears in the appellants' brief,[13] and there has never been any dispute that the letters were circulated as claimed by appellants or that they were authorized by the appellee company. The dispute in this case turns entirely around the questions of whether these letters ever gave the appellants any rights by contract and whether, if so, subsequent events have not terminated any such rights.

In the light of the finding[14] by the trial court that the letters "did not constitute an undertaking" by the appellee company, and they were "intended as, and would reasonably have been understood as, merely the statement of future plan or intention," the events leading up to these letters must be examined carefully. The theory of the case advanced by appellants' counsel[15] is that each of the appellants gave up a valuable consideration (i.e., his radio operator's job) in exchange for the promise of the appellee company to rehire him as a radio operator

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[13]Appellants' Opening Br., Appendix, pp. i to v.
[14]Transcript of Record, pp. 48 to 50.
[15]Appellants' Opening Brief, pp. 19 to 31.

(when the wartime use of non-pilot navigators ended). Now let us look at the facts, as testified to by the appellants themselves, to see whether such offer and acceptance situation ever existed.

The appellant Charman testified that he formally applied for the training and job as non-pilot navigator more than a month before he ever heard any mention about the appellee company's policy regarding future employment of men who took the job.[16] The appellant Hrutky said he heard about the possibility of a navigation job by the "grapevine" and formally applied for the job without inquiring or stipulating that he should have re-employment rights.[17] The appellant Cummings in his testimony did not say whether he inquired about re-employment rights or that this motivated his making the transfer.[18] The appellant Schwella, according to his testimony, took the navigation job and worked on it for more than eight months before he received any information regarding the appellee company's policy regarding re-employment,[19] and then he received only the second letter.[20]

So the picture painted by appellants' counsel of his clients' giving up their radio operator jobs because of a promise by the appellee company to rehire them as such at a later date, is simply not borne out by the facts. Let us now turn to what the appellee

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[16]Transcript of Record, pp. 88 to 91.
[17]Transcript of Record, pp. 168 to 170.
[18]Id. p. 195.
[19]Id. pp. 208 to 209.
[20]Plaintiffs' Exhibit 2.

company said. After three of the appellees had applied for and been assigned the new job as navigator, they received a general company memorandum containing the following statement:[21]

> "This assignment may or may not be of a temporary nature, however, in the event it is of a temporary nature and it is found no longer necessary to assign you as Navigator, you will resume your duties as Flight Radio Officer with no loss of seniority or advantages which you now have."

The trial court, in order to ascertain whether this statement rose to the dignity of a firm contractual undertaking to re-employ, of necessity looked to the general circumstances to see what the parties reasonably would have meant by the words used, given the custom and usage of the parties at the time. The testimony in this regard was clear and undisputed that, at the time the above quoted letter was issued, there were no collective bargaining contracts in existence governing this type of employee and that there were no formal rights to hold jobs on the basis of seniority. The word "seniority" as used in various bulletins of the appellee company, according to the testimony, related to length of service with the company giving rise to benefits such as vacation rights, sick leave, and the like.[22]

In other words, the promise that there would be "no loss of seniority," meant (and at the time could

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[21]Plaintiffs' Exhibit 1.
[22]Transcript of Record, pp. 215 to 216.

reasonably be understood) only that vacation, sick leave, and other such rights would be unimpaired. The word "seniority" then did not have the meaning which the appellants now seek to read into it, namely, a right by contract to hold a job in preference to all men hired at a later date.

The same can be said for the second letter circulated by the appellee company,[23] which said:

> "After the war, if the position of Non-pilot Navigator should be abolished, we will re-establish you in the Communication Department in a grade commensurate with your length of service with the company * * *"

This second letter was received by the appellants months after they had given up their radio operators' jobs and were working as navigators. It can hardly be said to have motivated them to act or have been the promise in exchange for which they acted.

E. Subsequent agreement authorized by appellants.

After the appellants had gone to work as navigators certain events occurred which, it is contended, cut off any special employment rights they may have had or could claim. One thing that happened was that each of the appellants signed a card reading:[24]

> "I hereby agree that the Board of Directors of Pan American Airways Navigators Association shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions. I further

[23]Plaintiffs' Exhibit 2.
[24]Transcript of Record, pp. 93 and 171.

> agree that the said Board of Directors or any agent or agents appointed by the Board shall have full authority to come to any agreement which they consider just and reasonable."

This authorization to negotiate a contract for "me" concerning "wages and working conditions" is as personal and individual as it could be. It can hardly be denied that within the scope of that authorization the agent could have entered into a separate, different and individual contract on behalf of each appellant. Further, the authorization is not limited to just wages and working conditions *as a navigator,* but is broad enough to cover the appellants' entire working relationship with the appellee company.

What the Navigators Association did, however, was to enter into a contract[25] with the appellee company which affected uniformly all navigators then in the employ of the appellee company, including each of the appellants. This contract was not limited to the wages and working conditions of the men while working as navigators, but also expressly covered the method of placement if and when the work as navigator ended. The terms of this new commitment required the appellee company only to "use its best efforts to place Navigators in available positions for which they are qualified when the policy of using Pilot-Navigators is resumed." The new contract agreed and referred to the procedure[26] by

[25]Defendant's Exhibit B.
[26]Defendant's Exhibit C.

which navigators would be given "ground employment" when their jobs as navigators came to an end.

The appellants do not contend that the appellee company failed to carry out this agreement to use best efforts to establish displaced navigators, and yet it clearly was a novation of, and superseded, any prior contractual rights they might have had. The appellants further acknowledge that they each knew their agent had negotiated this new agreement for them and did not repudiate it.[27]

F. Establishment of seniority list.

Meanwhile, other events were transpiring, according to the record, which served further to restrict such rights as the appellants might claim to have back their old jobs as radio operators.

When the appellants left their jobs as radio operators there was no collective bargaining agreement covering that craft, according to the testimony. There were no "seniority" rights in the sense of a right by contract to hold a radio operator's job in preference to men later hired, and such "seniority" as existed served only to determine the length of time of vacation, sick leave, etc., and even this was purely a matter of company policy and not embodied in a contract.[28]

After the appellants had ceased to be radio operators, the men in that craft formed a union and demanded for the first time collective bargaining rights.

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[27]Transcript of Record, pp. 94 and 172.
[28]Id. pp. 214 and 215.

The appellee company, as a carrier by air, was required by the Railway Labor Act[29] to negotiate with this union. The negotiations culminated in an agreement[30] reached after the intervention of the National Mediation Board, requiring the appellee company to set up a seniority list for flight radio operators. The method by which the first seniority list was to be established required the appellee company to submit, to a joint union-company seniority board, employment information regarding flight radio operators who were or had been employed. This information, as furnished to the seniority board, was produced in court,[31] and it shows that the appellee company included the employment history of each of the appellants on the information submitted to the seniority board.

At the time the seniority board rendered its decision, as to who should or should not have seniority as a radio officer in the employ of the appellee company, the appellants were of course not working as radio officers but as navigators. The board's seniority list[32] was broken down into an "active" list and an "inactive" list. The list, as introduced in court, showed the "active" list as including only those men *then* working as flight radio officers, who were given seniority rank in the order of their employment. The "inactive" list was composed of those men who

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[29]45 USCA §§151 to 188.

[30]Defendant's Exhibit E.

[31]Defendant's Exhibit V. See also Transcript of Record, pp. 219 to 222.

[32]Defendant's Exhibit M.

had been flight radio officers but who were not then employed as such. This inactive list was further subdivided into a Group A and a Group B. Group A related to men in supervisory positions (it was stipulated the appellants were not in supervisory positions[33]) and Group B was described in the exhibit itself as follows:

> "On the Inactive List, Group B consists of those former Flight Radio Officers who accrued seniority as such but *who are no longer accruing seniority* due to the nature of the positions held by them since leaving the Flight Radio Officers group and those who have been released from the group due to reduction in force." (Italics ours.)

This description would, of course, have fitted each of the appellants perfectly since each was a "former Flight Radio Officer" but no longer working as such, and hence he would have retained such seniority time as he had but would not have been "accruing seniority" while working out of the craft. Nevertheless, the name of none of the appellants appeared on the list, even though the appellee company had offered to the seniority board full information concerning each of the appellants.

The agreement establishing the seniority board[34] provided for the posting of the list for a period of 60 days during which employees could file protests. It was admitted that the list was so posted and that

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[33]Transcript of Record, p. 201.
[34]Defendant's Exhibit E.

none of the appellants filed a protest concerning the omission of his name from Group B.[35] It was testified that the list was posted in a place to which the appellants had access and which they occasionally visited,[36] but no one testified that he saw any of the appellants look at the list and each of them denied any knowledge of it.

It is of particular significance that had any one of the appellants protested the omission of his name by the seniority board, he would by the terms of the list[37] have been placed only in Group B, the group which retained radio officer seniority but did not accrue seniority while working in another craft. It was further testified that when a man on the inactive list, Group B, moved over to the active list because he had gone back to work as a flight radio officer, it was the custom and practice of the seniority board to place him on the list at a point equivalent to men who then had accrued seniority equal to that which he had retained.[38] In other words, the construction of the seniority system adopted by the seniority board, and which the appellee company was bound to accept, placed the man returning to a flight radio job on the active seniority list not at a point based on his actual first employment date as a flight radio officer, but at a point arbitrarily determined on the basis of the time he would have gone to work

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[35]Transcript of Record, pp. 172 and 173.
[36]Transcript of Record, pp. 229 to 231.
[37]Defendant's Exhibit M.
[38]Transcript of Record, pp. 233 to 238.

in that capacity in order to have accrued seniority time equal to that which he had been holding.

The existence of this seniority list effectively prevents the appellee company from now hiring the appellants as flight radio officers; and the list having been established pursuant to the Railway Labor Act, the list cuts off any re-employment rights the appellants may have had. This is true even though the appellants did not authorize the establishment of the list. The authorities on this point will be cited later.

G. Jobs offered to appellants.

As an additional ground for denying the claim of the appellants, the trial court found as a fact that the appellee company "offered to each of the plaintiffs employment in the communications department of defendant at a grade commensurate with the length of service of each said plaintiff; and that each said plaintiff refused and declined to accept said offers when made."

In other words, the court found that the appellee company had actually, and in fact, done just what the appellants claim the appellee company had undertaken to do. This finding was based on some most unusual testimony, the most remarkable being that of the appellant Hrutky, who testified[39] that in 1940 he had a ground job with the appellee company on Canton Island (a desolate spot in the mid-Pacific) earning some $200 a month. By the "grapevine" he

[39]Transcript of Record, pp. 168 to 170.

learned of the chance to get a flight navigator's job and urgently applied for it.[40] After holding a highly paid navigator's job from 1941 to 1948, he was unwilling thereafter to accept a ground radio operator's job from the appellee company at $300 per month in Los Angeles.[41] Rather than take that job he did nothing whatever during the entire year 1949, other than build himself a house in Oakland, as he himself acknowledged.[42]

The appellant Charman blandly acknowledged on cross-examination that he believed he was entitled to receive $160,000 from the appellee company and do no work for the rest of his life.[43] The appellant Cummings did not deny testimony that, in 1946 (when flight radio officers were needed), he ignored the admonition of the appellee's communications superintendent that he, and other similarly situated, should hasten to apply for jobs as flight radio officers.[44]

In addition, it was undisputed that, by letter dated March 4, 1949,[45] the appellee company gave each appellant the opportunity to apply for ground radio operators' jobs paying approximately $300 per month, and that this offer was refused by each appellant.[46] Their reasons for the refusal varied. One

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[40]Defendant's Exhibit O.
[41]Defendant's Exhibit K.
[42]Transcript of Record, pp. 178 to 181.
[43]Transcript of Record, pp. 95, 96, and 109.
[44]Id. pp. 201 to 203, and 269 to 271.
[45]Defendant's Exhibit I.
[46]Defendant's Exhibit J.

did not like to move to Los Angeles, another did not like the job because it might last only a year, another wanted a job with a higher salary. None seemed to think it necessary to take the job in order to mitigate damages.

No doubt their judgment was colored by the fact that they regarded themselves as having a lifetime guaranteed income. How they ever read such an agreement into the 1941 and 1943 company memoranda, is difficult to see.

H. Arbitration and award.

Finally, the court found, as still another reason for denying the claims of the appellants, that they each had (through their authorized agent) submitted "to a board of arbitration for decision the question of what rights of seniority or right of retention of employment, if any, the plaintiffs and others might have as against the defendant."[47] The court found that the arbitrators had awarded each appellant $2000 severance pay, which sums the appellee company was admitted to have paid.[48]

The evidence supporting this finding was clear and undisputed. Specifically, the appellee company placed in evidence the award of a board of arbitration dated November 10, 1948.[49] At the time this arbitration occurred, each of the appellants was represented, as they each acknowledge, by the Transport Workers

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[47]Transcript of Record, p. 65.
[48]Id. p. 42.
[49]Defendant's Exhibit H.

Union of America (CIO).[50] The award contains a careful resume of the problem of 65 non-pilot navigators (or "professional" navigators), including the appellants, whose services were no longer required. It concludes that the appellee company shall not be required to continue to employ non-pilot navigators, but does require that the appellee company compensate them by severance pay. Specifically the award provides:[51]

> "Upon dismissal each of the professional navigators employed by the Company will be given as severance pay the sum of $2000 which will include the amount that would be payable under Article 18(f) of the parties' agreement of December 31, 1946; they will also receive payment for vacation earned or accrued but not taken and refunds due under the Company insurance and retirement plans."

The checks by which these $2000 payments were made to each appellant were in evidence.[52] As we understand the position of appellants' counsel, the appellants regard this $2000 as compensating them only for the loss of the navigator's job, and that they are still entitled, under the 1941 and 1943 memoranda to jobs as flight radio officers. If this is the case, it is difficult to see how the loss of the navigator's job damaged them in any way. Indeed, according to their theory the flight radio officer's job would be just as good as the navigator's job.

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[50]Transcript of Record, pp. 41 and 42.
[51]Defendant's Exhibit H, p. 10.
[52]Defendant's Exhibits N, R, S, T, U, and V.

Since the arbitration award speaks of "dismissal" and "severance pay", plus refunds under "Company insurance and retirement plans", it is quite apparent that the board of arbitration intended the $2000 as a payment on complete severance of the employer-employee relation, and not as a payment on being moved from one position to another.

The appellants claim that they are differently situated from the other non-pilot navigators covered by the award, since each of the appellants worked for the appellee company as a flight radio officer prior to his employment as a navigator. This, of course, is an argument which should have been addressed to the board of arbitration. The award[53] does indicate on its face that the varying employment periods of the 65 navigators were considered. To be specific, the board said:

> "Under the circumstances a sliding scale *based on years of service* or rate of pay seems inappropriate. Severance pay of $2000 per employee in addition to accrued vacation allowance and refunds due under the Company insurance and retirement plan makes an appeal as fair, considering all pertinent conditions met in this situation." (Italics ours.)

The board rejected the sliding scale "based on years of service", and gave a uniform rate of severance pay to each navigator. Had the sliding scale been adopted, the years of service of each of the appellants as a flight radio officer would have been

[53]Defendant's Exhibit H, p. 9.

an element to increase his severance pay. If the board of arbitration was unjust in declining to use a sliding scale, that injustice can hardly be remedied now by court action. Having thrown their employment rights into the arbitration proceeding, the appellants are bound by the award whether they like the decision or not, and the trial court correctly so found.

I. Lack of proof of damage.

Each of the appellants asked for damages in the staggering sum of $160,000. The trial court, however, found that, as to each appellant, he "has not shown that he suffered any damages by way of lost wages by reason of his not being reemployed by the defendant, irrespective of whether the defendant did or did not agree to re-employ him."[54]

In order to find themselves to be damaged, it was necessary for the appellants to adopt a construction of the flight radio officers seniority system which does complete violence to the way that list was shown to have been administered. If they believed they had re-employment rights as flight radio officers, it was, of course, incumbent upon them to see to it that their names appeared on the seniority list.

It was not denied that the appellee company furnished the data to the seniority board upon the basis of which that board could decide whether each of the appellants was entitled to a place on that list.

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[54]Transcript of Record, p. 52.

When the list appeared, the appellants were not included[55] and, although they had access to the list for the 60-day protest period, none of the appellants protested his omission from the list. There was surely no duty on the part of the appellee company to urge the appellants to protest.

The list itself shows that even if the appellants had by protest obtained a place upon the list, each would have been on the "Inactive" portion of the list, and in Group B thereof. The list[56] provides:

> "On the Inactive List, Group A consists of those former Flight Radio Officers who are now in ground positions involving supervision of Flight Radio Officers and who therefore continue to accrue seniority."

It will be recalled that the list further provides:

> "On the Inactive List, Group B consists of those former Flight Radio Officers who accrued seniority as such but who are no longer accruing seniority due to the nature of the positions held by them since leaving the Flight Radio Officers group and those who have been released from the group due to reduction in force."

Since it was stipulated that none of the appellants was, when the list was issued, in a ground position involving supervision of flight radio officers,[57] they at best would have been in Group B, the men in which "are no longer accruing seniority". In other

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[55]Defendant's Exhibit M.
[56]Defendant's Exhibit M, p. 19.
[57]Transcript of Record, p. 201.

words, they would have retained, but not accrued, seniority. It was not denied that the seniority time they would have so retained was as follows:[58]

Charman	5 years	2 months	25 days
Cummings	5 "	1 "	20 "
Hrutky	3 "	6 "	16 "
Schwella	4 "	7 "	15 "

It was further not denied that, when the navigator jobs of the appellants were terminated on November 15, 1948, the most junior man on the flight radio officers seniority list who was still employed *had 5 years, 7 months and 8 days service.*[59] The uncontradicted testimony was that, since that date, the employment of flight radio officers has been further curtailed.[60] It follows that regardless of whether the appellants should or should not have been placed upon the flight radio officers seniority list, none of them could have been actually employed, without doing complete violence to the terms of the list and without depriving another man of a job to which he was entitled.

Another element that must have been weighed by the trial court in computing damages, is whether employment as a flight radio officer is likely in any event to continue. Each appellant claimed $150,000 in lost wages on the assumption that for the next twenty years he would be so employed. This has been shown to be directly contrary to the facts. The

[58]Id. p. 264.
[59]Id. p. 262.
[60]Id. pp. 238 and 239.

diagram of the flight decks of aircraft used on the transpacific run[61] clearly demonstrates that in the last ten years the number of men not engaged directly in piloting the plane has dropped rapidly and progressively.

On looking at this particular exhibit, the trial court judge turned to the appellants and said:[61a]

> "I can almost understand this situation gentlemen, in relation to your jobs. I can see them fading away with this modern method."

Of course, the burden of proof was on the appellants to show that the jobs they claim to be deprived of could reasonably have been anticipated to exist for the period in which they claimed damages. This, they did not do.

The Civil Aeronautics Board recommendation of which the appellants' brief speaks[62] does *not* say that flight radio officers as such must be employed, and by its very terms says that the Board does not recommend that a separate man be employed for this function who is not qualified for other duties.

Assuming the appellants had some contract rights which were not long ago cut off by union agreements and awards, damages would have to be measured by the rule set forth in cases like *McGee v. St. Joseph Belt Ry. Co.* (1936), 233 Mo. App. 111, 93 S.W. (2d) 1111, where the court said:

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[61]Defendant's Exhibit W.
[61a]Transcript of Record, p. 244.
[62]Appellants' Opening Brief, p. 55 (Plaintiffs' Exhibit 12).

> "If plaintiff has a right to recover, and the jury has so found, then he is entitled to the wages he would have received if the contract had been lived up to, less such remuneration as he has been able to receive for such work as his diligence would enable him to earn.
>
> "There is evidence from which it can be concluded that with existing volume of business there was work sufficient to keep five engines employed. There is evidence from which it can be concluded that if the contract had been lived up to, that plaintiff's seniority considered, he would have had regular employment.

It will first be noted that in the *McGee* case the court looked for evidence that there would be work sufficient "to keep five engines employed" which would have resulted in "regular employment" for the plaintiff. In the case at bar, the undisputed testimony was that there would be progressive shrinkage in the employment of flight radio officers and that it would soon reach the vanishing point.

As the *McGee* case also points out, damages claimed by a plaintiff must be reduced by "such remuneration as he has been able to receive for such work as his diligence would enable him to earn." For example, the appellant Schwella acknowledged that his gasoline station netted him $5,200 last year.[63] The appellant Hrutky, by his own admission, expects in "a year, but I hope it will be sooner" to have a full share in a tuna fishing enterprise, which

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[63]Transcript of Record, p. 212.

he said will net him as much as $8,000 per year, plus his board and room.[64] Appellant Cummings said that he expects good business at his launderette concern,[65] and the trial court also apparently believed that, with reasonable diligence, the launderette business of appellant Charman will also prosper. When these deductions are made, the damages the appellants could claim would at most be negligible, and the finding of the trial court was therefore proper.

II.

LAW.

Let us now examine, one by one, the points of law raised in the appellants' brief as grounds for reversal of the judgment below.

A. THE FINDINGS ARE PROPER AND SUPPORTED BY THE EVIDENCE.

At the outset appellants' counsel assert the findings of the court below:[66]

> "* * * do not represent in a true sense findings of ultimate fact; on the contrary, they represent an expression of the various legal theories upon which the appellee tried its case below."

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[64]Id. pp. 183 and 184.
[65]Id. p. 189.
[66]Appellants' Opening Brief, p. 21.

The counsel go on to say that the findings are "a series of conflicting views," and that it can not be told "which of the various theories of appellee the trial court adopted."

To see whether this criticism of the findings is valid, it is necessary to look first at the issues as framed by the pleadings. The appellants alleged in their complaint (a) the making of a contract by the appellee company, (b) the breach of that contract, and (c) damages to the appellants. The answer of the appellee company (a) denied the making of a contract, (b) denied that damages were suffered by the appellants, and (c) interposed four separate defenses as follows:

(1) *Novation (through an agent),* in that the appellants had their authorized agent (the union) negotiate an agreement for them which superseded and was a novation of any contract rights they might have under the earlier memoranda.

(2) *Prevention (by federal law),* in that, as an air carrier, the appellee company is subject to the Railway Labor Act and required to bargain with employee organizations certified by the National Mediation Board; and that an independent association and later the Transport Workers Union (CIO), of which the appellants are members, forced the appellee company to accept (after intervention of the National Mediation Board) a labor agreement setting up a seniority system which prevents the appellee company from now re-employing the appellants as flight radio officers.

(3) *Tender of employment,* in that employment has been offered to the appellants which they rejected.

(4) *Arbitration and award,* in that the rights of the appellants to re-employment were the subject of an arbitration proceeding, conducted under the Railway Labor Act, and that they were awarded by the board of arbitration the sum of $2,000 each, which the appellee company paid.

It will be seen that none of these defenses is factually inconsistent with the other. That is, there is no inconsistency between denying there was a contract to begin with, and then alleging that, irrespective of this, later events cut off any rights which the appellants might claim.

The court held in favor of the appellee company on all the grounds, and there is by the same token nothing inconsistent in this. It will also be noted that the court's findings were quite careful to avoid any inconsistency. In this regard the court found first that the two memoranda "did not constitute an agreement or undertaking" and were not so intended or understood.[67] It next found, as to each appellant, that he "has not shown that he suffered any damages."[68] Then, proceeding to the separate defenses, the court found that a new agreement had been entered into that "was a novation of *any and all* agreements or understandings previously existing."[69]

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[67]Transcript of Record, pp. 48 and 50.
[68]Id. p. 52.
[69]Id. p. 55.

The court found next that a seniority system had been established pursuant to the Railway Labor Act and the action of the National Mediation Board, that under it the appellants could not qualify for jobs, and that the "defendant is prevented by law * * * from employing any of the plaintiffs as a flight radio officer."[70] The court found that the appellee company further had "offered to each of the plaintiffs employment" which met that claimed under the alleged agreement, and that each of the appellants had "refused and declined" such offer. Lastly, the court found that the appellants had each entered into an agreement which "submitted to a board of arbitration for decision the question of what rights of seniority or right of retention of employment, *if any,* the plaintiffs and others *might have*" as against the appellee company, and that the appellee company had complied with the arbitration award.[71]

It is abundantly clear from the foregoing that the court's findings were carefully worded to eliminate any possibility of inconsistency. Since Rule 52(a) of the *Rules of Civil Procedure* requires the court to "find the facts specially" on every issue raised by the pleadings, it is difficult to see what the court could have done other than what it did.

The appellants urge that there is inconsistency where a court finds that there was no contract and, in addition, finds further that a defendant has some additional defense. We assume very little authority

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[70]Id. p. 63.
[71]Transcript of Record, p. 65.

is required to show that this is not the law. In *Borgstrom v. Bryan* (1929), 101 Cal. App. 164, 281 Pac. 432, the court said:

> "The trial court made a finding in favor of the defendants on adverse possession, and it also made a finding in their favor as the holders of the record title. The plaintiffs contend that the two findings are contradictory. Of course that is not so."

Similarly, in *Wilson v. Black* (1945), 49 N.M. 309, 163 Pac. (2d) 267, the court said:

> "We find no inconsistency between the finding of the trial court that the indebtedness had been paid and another finding that the suit was barred by the Statute of Limitations, i.e. findings Nos. 3 and 6. It is merely to say that the debt has been paid, and moreover, and in addition, whether or not it has been paid, it is, nevertheless, barred by the Statute of Limitations. Either finding, substantially supported, would defeat plaintiff's claim. If the plea of payment, and the plea of the Statute of Limitations are not inconsistent, and they are not * * * they may both be relied upon. * * * These two defenses were pleaded separately, as the rule provides, and upon the evidence taken the court sustained the contention of defendant as to both."

The appellants' brief goes on to refer to findings "prepared by winning counsel" and which "followed the pleadings of the prevailing party",[72] and there-

[72]Appellants' Opening Brief, pp. 22 and 23.

fore urges on this court "an independent consideration of the evidence adduced below".[73]

This contention is amply answered by the decision in *Simons v. Davidson Brick Co.* (C.C.A. 9, 1939), 106 F. (2d) 518, where this court said:

> "Indeed, the appellant claims that he is entitled to disregard the findings of fact by the trial court because they were prepared by appellee's counsel. 'Obviously', he states, 'they were not made by the court and they are mere argument and prejudiced contentions'. He argues that we should disregard the findings stating 'under these circumstances the Circuit Courts of Appeals proceed as if no findings had been made by the trial court.' "

This court went on to say:

> "We cannot accede to this contention. The fact that opposing counsel has prepared and submitted findings of fact for the consideration of the trial judge, and that such findings of fact may have been adopted by the trial judge as his findings, in no way detracts from their legal force or effect. The characterization of the findings of fact adopted by the trial court as 'appellees' findings of fact' is wholly unwarranted."

It is therefore submitted that the findings are proper and stand unless clearly erroneous. This brings us to the matter of the support in the record for the findings and correctness of the legal conclusions drawn from the facts as found.

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[73]Id. p. 25.

B. THE ASSURANCES GIVEN THE APPELLANTS REGARDING RE-EMPLOYMENT ARE NOT CONTRACTS OF A BINDING LEGAL NATURE.

The appellants' entire case necessarily rests on the company memorandum dated January 21, 1941[74] to each appellant, to the effect that if he ceased to be a navigator "you will resume your duties as Flight Radio Officer with no loss of seniority or other advantages which you now have". The April 22, 1943 memorandum[75] adds very little, and since it came more than two years after the appellants had transferred to their new duties, it can in no sense be regarded as a contract between the parties.

As has been previously pointed out, the "seniority or other advantages" which the appellants had in 1941 were no more than the usual custom of the appellee company to observe length of service in giving vacations, sick leave, service awards, etc. There was no "seniority" in the sense of a binding seniority list. The testimony of the witness Fisher on this point was undisputed.[76]

Even though the memoranda were in the form of positive assurances, that does not necessarily make them binding in a legal sense. Many assurances or statements are made which do not give rise to legally enforceable rights.

According to 17 *C.J.S.* 388 (§46):

> "A mere statement of intention, or, as it is sometimes called, a 'promissory expression,' made

[74]Plaintiffs' Exhibit 1.
[75]Plaintiffs' Exhibit 2.
[76]Transcript of Record, pp. 214 to 216.

> without intention to contract, is not such an offer as may be turned into an agreement by acceptance. * * *"

In *Broad Street N. Bank v. Collier* (1933), 112 N. J. Law 41, 169 A. 552 (Affd. 174 A. 900), the court said:

> "A declaration of intention to act in a certain way, which does not show that the party who makes such declaration promises to act in such way, or intends to incur a legal liability obliging him to act in such way, is not an offer which can be accepted so as to make a contract."

In *Ball v. Yates* (1947), 158 Fla. 521, 29 So. (2d) 729 (cert. den. 332 U.S. 774), the court said:

> "A statement that an act would be done is not essentially a promise to do it, and not all promises are contractual."

In view of the above, the assurances given the appellants never were such as would give rise to enforceable rights. What the appellants say in their brief,[77] to the effect that the existence of a contract is to be determined by what the parties say rather than what they mean, is all very true. But this still leaves for decision what the parties would reasonably have been understood to intend when, in 1941, they used the words "seniority or other advantages you now have." This, in turn, depends on what the usage, practice and general understanding of the parties was

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[77]Appellants' Opening Brief, p. 27.

at the time. As is said in *Restatement of Contracts*, §246 (comment [a]):

> "* * * Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear. * * *"

The trial court heard the testimony concerning the usage of the parties at the time in connection with the word "seniority", and found that under the circumstances it "would not reasonably be understood and actually was not understood" to have the meaning appellants now claim.[78] Since there is testimony in the record supporting this usage, the finding of the trial court is not open to challenge here.

C. THE APPELLANTS EACH INDIVIDUALLY AUTHORIZED THE NAVIGATORS ASSOCIATION TO NEGOTIATE A NEW AGREEMENT FOR THEM.

Assuming for the moment the assurances given to the appellants rose to the dignity of binding re-employment contracts, let us see what would follow. As previously stated, it was stipulated that on or about October 27, 1944, each appellant executed and delivered to the Navigators Association an authorization card reading:[79]

> "I hereby agree that the Board of Directors of the Pan American Airways Navigators Associa-

[78]Transcript of Record, pp. 48 and 50.
[79]Transcript of Record, p. 171.

> tion shall represent me in the negotiation of a contract with Pan American Airways concerning wages and working conditions.
>
> "I further agree that the said Board of Directors, or any agent or agents appointed by the Board, shall have full authority to come to any agreement which they consider just and reasonable."

It will be noted again that this authorization clearly speaks of the *individual* rights of each appellant, and uses the words "I hereby agree" and "shall represent me". If the appellants had any individual rights under the prior assurances, they each definitely authorized the association to negotiate a wholly new agreement for them on the same subject matter. That agreement, entered into January 4, 1945,[80] was in the form of a commitment by the appellee company to use "its best efforts to place Navigators in available positions for which they are qualified when the policy of using Pilot-Navigators is resumed." The procedure agreed upon[81] referred to "ground employment" for former navigators.

The union agreement of January 4, 1945 was wholly at variance with the earlier unilateral memoranda, and therefore of necessity superseded and was a full and complete novation of any earlier rights. As is stated in *Riverside Coal Co. v. American Coal Co.* (1927), 107 Conn. 40, 139 A. 276:

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[80]Defendant's Exhibit B.
[81]Defendant's Exhibit C.

> "As a general rule, when the new contract is in regard to the same matter and has the same scope as the earlier contract and the terms of the two are inconsistent either in whole or in a substantial part, so that they cannot subsist together, the new contract abrogates the earlier one in toto and takes its place, even though there is no express agreement that the new contract shall have that effect."

The individual contracts claimed by the appellants and the later union contract are obviously "in regard to the same matter," and since the "terms of the two are inconsistent," it follows that there has been as complete an abrogation and novation of any prior individual claims as though the union contract had expressly so declared.

In their brief, the appellants assert[82]

> "That *subsequent* collective bargaining contracts and even arbitration awards such as are here relied upon do not deprive an employee of his rights established under a prior contract, is the settled law of this circuit."

The appellants proceed to cite two maritime cases decided by this court, both of which are readily distinguishable from the case at bar and do not stand for the broad generalization imported into them by appellants. The case of *Steeves v. American Mail Line* (C.C.A. 9, 1946), 154 F. (2d) 24, is not in point for the following reasons:

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[82]Appellants' Opening Brief, p. 34.

(a) The dispute there was as to *how much* war bonus and repatriation payments the seamen should get. (This, unlike seniority, does not conflict with the rights of another employee.)

(b) This court clearly pointed out that the individual seamen had not authorized the union to submit their private rights to a board. (Here the appellants each personally authorized the union to bargain and change their individual rights.)

(c) The seamen had no chance to disaffirm what was done, since they were interned in Japan. (The appellants here had full opportunity to disaffirm the union's agreement but did not do so.)

(d) The Railway Labor Act gives collective bargaining contracts express legislative sanction, as will be shown later.

Agnew v. American President Lines (C.C.A. 9, 1949), 177 F. (2d) 107, is also not in point. There this court said:

> "Appellees contend as they did in the Steeves case that an agreement between appellants' unions and the American President Lines made on February 21, 1942, that is *two and a half months after the capture of the appellants,* retroactively wiped out the provisions of the articles' rider which, as we hold, gave them the right to the war bonus during their captivity. For the reasons stated in Steeves v. American Mail Line, supra, 154 F. 2d, page 26, we find no merit in this contention." (Italics ours.)

In addition to the novation which the appellants each individually authorized, there must also be considered the agreement with the Flight Radio Officers Association (now Transport Workers Union—CIO) which imposes a seniority system upon the appellee company which prevents placement of the plaintiffs as flight radio officers.

D. THE FLIGHT RADIO OFFICERS SENIORITY LIST ENTERED INTO UNDER THE REQUIREMENTS OF THE RAILWAY LABOR ACT BINDS THE APPELLEE COMPANY AND EXCUSES PERFORMANCE OF ANY CONFLICTING UNDERTAKINGS.

At the pretrial conference it was stipulated[83] that the defendant, as a carrier by air, during all times herein involved has been subject to the terms of the Railway Labor Act (45 USCA §§ 151 to 188). The rights and duties of the appellants, as well as of the appellee company, are therefore governed by that act, and not by the law governing maritime employment or other employment generally.

The trial court was referred to a case identical, in all substantial regards, with the case at bar, namely, *Lewellyn v. Fleming* (C.C.A. 10, 1946), 154 F. (2d) 211 (cert. den. 329 U.S. 715). There, a railroad employee sued for $8,000 as the alleged value of seniority rights under an individual agreement entered into before the railroad was unionized. The employee contended:

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[83]Transcript of Record, p. 42.

"Appellant contends that his seniority rights acquired under his employment contract are vested, valuable property rights; that he has never been a member of the Brotherhood; never consented to the contract which deprived him of his seniority rights, and his suit is based upon the premise that the Railway Labor Act does not authorize the abrogation of his vested rights by a contract between the Brotherhood and his employer, and could not constitutionally do so under the Fifth Amendment."

The court said:

"Here the Order of Railway Conductors was the statutory bargaining agent, and as such was authorized to enter into a contract with the Railroad Company concerning wages, hours and conditions of employment, and this undoubtedly included the authority to prospectively contract with reference to seniority rights of the members of the craft, whether members of the union or not."

The court said further:

"The Act clothes the bargaining representative with 'powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents.' In the exercise of its legislative functions, the statutory representative is charged with the public interest contemplated by the purposes of the Act, and is constitutionally bound to protect equally the interests of the members of the craft it is authorized to represent."

The court said further:

> "Private contracts relating to matters affecting interstate commerce are necessarily made in contemplation of transcendent Congressional power to regulate all matters and activities in commerce or affecting commerce. And such contracts, when validly made, can be enforced only in a manner not to conflict with the expressed Congressional policy."

The court concluded:

> "The appellant has no constitutional right to insist upon the observance of a private contract, the effect of which is to deny the incidence of a contract entered into in furtherance of an expressed Congressional policy, which the Congress is free to adopt."

Counsel for the appellants, in the case at bar, has repeatedly stressed the fact that the appellants were not members of the Flight Radio Officers Association, and argues that because of this the seniority agreement of April 16, 1946[84] could not affect their rights. However, the plaintiff in the *Lewellyn* case also was not a member of the brotherhood that entered into the seniority agreement, and yet the court said that his personal agreement must have been made "in contemplation of the transcendent Congressional power" to regulate interstate commerce and could "be enforced only in a manner not to conflict with the expressed Congressional policy."

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[84]Defendant's Exhibit E, p. 8.

For the appellants in the case at bar to enforce their individual claims to jobs would disrupt the orderly seniority system established under Congressional policy, and to force the appellee company to pay damages would penalize it for having obeyed the mandate of Congress. The *Lewellyn* case alone is a complete answer to the appellants' claims.

A little over five pages of the appellants' brief[85] is devoted to an attempt to distinguish the *Lewellyn* case, and in substance these are the points of distinction there made:

(a) Lewellyn's seniority claim was based on custom and usage, not on a written document.

(b) Lewellyn sought to exercise his seniority to get a promotion, rather than to step back into a job previously held.

(c) The consideration given by Lewellyn for the railroad's promise of seniority was not the surrender of a job then held.

It is submitted that these are distinctions without a difference. The court in the *Lewellyn* case assumes that his seniority rights arose by a "prior individual contract of employment", and it therefore is immaterial whether this contract is oral or written, or is express or implied. The existence of a written document in the case at bar cannot therefore make it different from the *Lewellyn* case.

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[85]Appellants' Opening Brief, pp. 42 to 47.

Seniority is used equally to gain promotions, to hold a present job, or to pre-empt a job of inferior rank when a reduction in staff forces demotions. In 1917 Lewellyn received a promise of seniority which in 1942 he could have used to gain a promotion but for the fact that a 1938 union agreement had abrogated his contract rights. In the case at bar, the appellants claim that a promise of seniority given them in 1941 could be used by them in 1948 to pre-empt a radio officer's job when the termination of their navigators' jobs made them willing to accept this demotion, and the appellee company asserts that a 1946 union agreement abrogates such right as the appellants may have had. The principle involved is exactly the same whether the seniority would lead to a promotion or to preference on demotion. If the intervening union agreement cuts off prior contract rights in one case it should in the other.

Finally, to say that "there was no detriment to the employee in the *Lewellyn* case" but that there was "a definite detriment to appellants here when they transferred from one department to another," runs contrary to elementary principles of contract law. If a promise of seniority was made to Lewellyn, the consideration given by him in exchange for that promise was the act of accepting or continuing employment with the railroad, a thing he was not legally obligated to do. This is sufficient legal detriment to support the promise of seniority, and his position would not have been strengthened by yielding another job or transferring from one department to another (see: 1 *Williston on Contracts* [Rev. Ed.] 326, § 102A).

It follows that even if it be assumed that the appellants had binding individual contracts, which had not been lost by way of novation, in view of the seniority system now being administered pursuant to the Railway Labor Act, the "transcendent Congressional power" has abrogated those individual contracts.

The appellants also argue that[86]

> "There is certainly no doctrine in the law of contracts which permits a contracting party to be relieved of liability under a contract upon the ground that it subsequently entered into another contract with a third party which makes the performance of the original contract either difficult, onerous or impossible."

The above is unquestionably true as an abstract legal principle; however, we do not have here a case of a party who voluntarily entered into conflicting contractual obligations. The findings of the trial court on this point were most explicit, and the court said[87]:

> "That it is true that on the 26th day of June, 1946, the defendant and said Flight Radio Officers Association found that they were unable to agree upon the terms of a collective bargaining agreement then being negotiated between them; that upon said date they applied to the National Mediation Board for mediation services, as provided in said Railway Labor Act; that said National Mediation Board accepted said matter as N.M.B. case number A2381, and proceeded to act as provided in said Railway Labor Act; that on

[86]Appellants' Opening Brief, p. 40.
[87]Transcript of Record, p. 60.

> or about October 28, 1946, in the presence of a representative of said National Mediation Board, said parties reached an agreement; and that on or about the 4th day of November, 1946, said matter was ordered closed and terminated by said National Mediation Board."

One of the prime purposes of the Railway Labor Act is "to avoid any interruption to commerce or in the operation of any carrier engaged therein." As the court said in the *Lewellyn* case:

> "Congress was undoubtedly free to enact the Railway Labor Act in the exercise of its commerce powers, and the policy expressed therein cannot be thwarted or hindered by contracts between private parties."

The acceptance by the appellee company of the National Mediation Board's decision settling case number A2381, is not a voluntary act of making conflicting contractual commitments. In yielding to Congressional mandate, the appellee company must, as a necessary corollary, be given immunity from individual contract claims which conflict with that mandate.

III.

CONCLUSION.

The legal principle set forth in the *Lewellyn* case, while most interesting, is not necessarily the basis of a decision in the case at bar. The trial court found against the appellants on essential preliminary mat-

ters of fact, so it would be proper to dispose of this appeal without reaching the point involved in the *Lewellyn* case.

The trial court heard the witnesses in connection with the usage and background underlying the alleged agreements on which the appellants sue, and the court found that no contract arose in the first place. Similarly, the trial court found that the appellants had failed to adduce evidence of damage. These rather simple points are sufficient to dispose of this appeal, and the discussion above of the effect on individual employee rights of subsequent collective bargaining agreements may for that reason be unnecessary.

Indeed, the existence of these factual grounds for a disposition of this appeal should be sufficient, under the rulings of this court as stated in *Faivret v. First National Bank in Richmond* (C.C.A. 9, 1947), 160 F. (2d) 827, as follows:

> "From an examination of the record, it is clear that the trial court based its conclusions largely upon an evaluation of the testimony given, much of it being conflicting * * * This Court has repeatedly held that, under such circumstances, it would not be inclined to disturb the findings of the lower court."

There are of course additional grounds here for sustaining the decision of the trial court, namely, that the appellants authorized and acquiesced in a novation of any previous contract rights they may have had, and further that the appellee company has been required by the Railway Labor Act to make certain

union agreements as a corollary of which it is freed from any prior inconsistent individual agreements. These points make the case at bar quite different from the maritime cases previously before this court and which appellants cite.

It is submitted that the judgment below should be affirmed.

Dated, San Francisco, California,
December 27, 1950.

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